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Parent & (and) Child - Loss of Consortium - Negligent Entrustment - Tort Law: North Dakota Allows Recovery for Loss of Filial Consortium and Extends Doctrine of Negligent Entrustment to Include Gun Retailer

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PARENT & CHILD — LOSS OF CONSORTIUM — NEGLIGENT ENTRUSTMENT — TORT LAW: NORTH DAKOTA ALLOWS RECOVERY FOR LOSS OF FILIAL CONSORTIUM AND EXTENDS DOCTRINE OF NEGLIGENT ENTRUSTMENT TO INCLUDE GUN RETAILER

On January 4, 1983 Steven Holen, then age fourteen, was seriously injured when fifteen-year-old William Boyer discharged a twenty-two caliber pistol causing a bullet to strike Steven in the head.[1] Steven's conservator, First Trust Company of North Dakota, and Steven's mother, Karlene Holen, brought an action against William, his mother Kathryn Boyer, and the gun retailer, Scheels Hardware & Sports Shop, Inc. (Scheels Hardware), for damages resulting from the injuries suffered by Steven.[2] On the day the pistol was purchased, William's mother accompanied him to Scheels Hardware.[3] A Scheels Hardware salesperson handed William a pistol which William showed to his mother.[4] William indicated to the salesperson that he and his mother would purchase the pistol.[5] The salesperson assisted Kathryn in completing a federal firearms form and William carried the pistol to the checkout stand.[6] William paid cash for the pistol and carried it out

1. First Trust Co. v. Scheels Hardware & Sports Shop, 429 N.W.2d 5, 7 (N.D. 1988). The shooting was an accident. *Id.* William Boyer, Steven Holen, and two other boys were visiting in William's bedroom just before the shooting. *Id.* It could be inferred from conflicting testimony that Steven had secretly loaded the pistol. *Id.* When William pulled the trigger, the pistol dry fired twice. *Id.* On the third squeeze, the gun discharged striking Steven in the head. *Id.*

2. *Id.* at 8. The complaint alleged Scheels Hardware "negligently, carelessly, and unlawfully sold, delivered, or otherwise transferred a pistol" to William. *Id.* Plaintiffs also claimed that William was negligent when he shot Steven. *Id.* North Dakota law allows damages for negligent actions which cause injury to others. *See* N.D. CENT. CODE § 9-10-06 (1987)(a person who lacks ordinary care is responsible for injury to another person).

3. *First Trust Co.*, 429 N.W.2d at 7. The evidence showed that William had saved money for several months in anticipation of buying the pistol. *Id.* North Dakota law prohibits a person from selling or transferring a handgun to someone who is younger than eighteen years old. N.D. CENT. CODE § 62.1-02-02 (1985); *see* N.D. CENT. CODE § 62.1-03-02 (1985)(it is a class A misdemeanor to sell, barter, hire, lend, or give handgun to a minor). North Dakota law regarding the transfer of handguns conforms to federal law in the same area. *Compare* 18 U.S.C. § 922(b)(1)(1983)(it is unlawful for licensed firearms dealers to sell "any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age") *with* N.D. CENT. CODE § 62.1-02-02 (1985)(it is unlawful to transfer a handgun to a person the transferor knows or has reason to believe is under 18 years of age).

4. *First Trust Co.*, 429 N.W.2d at 7. William Boyer's father, James Boyer, had talked with Kathryn Boyer about purchasing a pistol for William and James Boyer had approved the purchase that took place at Scheels Hardware. Brief for Appellee Scheels Hardware & Sports Shop at 49, First Trust Co. v. Scheels Hardware & Sports Shop, 429 N.W.2d 5 (N.D. 1988)(No. 870134).

5. *First Trust Co.*, 429 N.W.2d at 7. William had previously discussed handguns with a Scheels Hardware salesperson on three occasions. *Id.*

6. *Id.* Federal law requires a firearm to be registered with the federal government when it is transferred. *See* 26 U.S.C. § 5841(b)(1983)(under National Firearms Registration

of the store.[7] William was familiar with the use of firearms, having taken a hunter's safety course.[8] Steven Holen was shot three days after the handgun had been purchased.[9]

In a special verdict, a district court jury found both Scheels Hardware and Kathryn Boyer negligent; however, the jury found that neither the actions of Scheels Hardware nor Kathryn Boyer was the proximate cause of Steven's injury.[10] The district court jury also found that Steven Holen and William Boyer were both negligent and that each boy's conduct was a fifty percent proximate cause of Steven's damages.[11] After the jury returned its verdict, the district court, pursuant to section 9-10-07 of the North Dakota Century Code, awarded no damages and dismissed the plaintiff's action on its merits.[12] On appeal, the North Dakota Supreme Court *held* that Karlene Holen may recover for the loss of her son's society and companionship caused by the negligence of Scheels Hardware and extended the doctrine of negligent entrustment to situations involving the sale of guns.[13] *First Trust*

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and Transfer Record "[e]ach firearm transferred shall be registered to the transferee by the transferor"); 79 AM. JUR. 2D *Weapons & Firearms* § 32 (1975)(National Firearms Registration and Transfer Record is a creation of the National Firearms Act which provides criminal penalties and forfeiture of firearms for violations).

7. *First Trust Co.*, 429 N.W.2d at 7. North Dakota law provides that a person under eighteen years of age may not possess a handgun except under adult supervision and for "purposes of firearm safety training, target shooting, or hunting." N.D. CENT. CODE § 62.1-02-01(4)(1985 & Supp. 1987)(violation of section 62.1-02-01(4) constitutes class A misdemeanor).

8. Brief of Appellee Scheels Hardware & Sports Shop at 48, First Trust Co. v. Scheels Hardware & Sports Shop, 429 N.W.2d 5 (N.D. 1988)(No. 870134). At the time of the sale, William was not agitated and acted normal. *Id.* William also owned two twenty-two caliber rifles and a shotgun. *Id.*

9. *First Trust Co.*, 429 N.W.2d at 7. There was no dispute that before the shooting the boys had been handling the gun. *Id.*

10. *Id.* at 8.

11. *Id.* Under North Dakota law, if the plaintiff's negligence is as great as the defendant's negligence, no award is possible. N.D. CENT. CODE § 9-10-07 (1985). Section 9-10-07 of the North Dakota Century Code provides in relevant part:

> Contributory negligence does not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed must be diminished in proportion to the amount of negligence attributable to the person recovering.

Id. Accidental discharge of a gun is presumptive evidence of negligence. *See* 79 AM. JUR. 2D *Weapons & Firearms* § 35 (1975)(civil liability for injuries resulting from discharge of handgun).

12. *First Trust Co.*, 429 N.W.2d at 8. *See* N.D. CENT. CODE § 9-10-07 (1987)(there is no recovery for a victim who is 50 percent or more negligent for the victim's own injury). For the relevant text of section 9-10-07 of the North Dakota Century Code, see *supra* note 11. The district court denied the plaintiffs' alternative motions for judgment notwithstanding the verdict and for a new trial. *First Trust Co.*, 429 N.W.2d at 8.

13. *First Trust Co.*, 429 N.W.2d at 9, 11. The North Dakota Supreme Court reversed the district court decision remanding the case for a new trial on the claims against Scheels Hardware. *Id.* at 14. The court held that the jury should have been given an instruction on

Co. v. Scheels Hardware & Sports Shop, Inc., 429 N.W.2d 5 (N.D. 1988).

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negligent entrustment for the claim against Scheels Hardware. *Id.* at 9. The negligent entrustment instruction was requested by the plaintiffs and was contained in jury instruction No. 22, "Transfer of Firearm," which provided:

> One who sells directly or through a third person an item, including a firearm, to another whom the seller knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use in a manner involving unreasonable risk of physical harm to himself or others whom the seller should expect to share in or be endangered by its use, is subject to liability or physical harm resulting to them.

Brief for Appellants at 51, First Trust Co. v. Scheels Hardware & Sports Shop, 429 N.W.2d 5 (N.D. 1988)(No. 870134). The trial court in *First Trust Company* had instructed the jury on ordinary negligence. *First Trust Co.*, 429 N.W.2d at 8. The definition of ordinary negligence regarding civil cases stated in the North Dakota Pattern Jury Instruction manual: " 'Ordinary negligence' is the lack of ordinary care and diligence required by the circumstances. Ordinary care of diligence means such care as a person of ordinary prudence usually exercises about his own affairs of ordinary importance." N.D. PATTERN JURY INSTRUCTIONS-CIVIL 105 (1986).

The North Dakota Supreme Court summarily addressed a number of other issues raised by plaintiffs including:

1) Whether the trial court erred by instructing the jury on the assumption of risk doctrine. *First Trust Co.*, 429 N.W.2d at 9. The court stated that the assumption of risk doctrine had been abolished in North Dakota. *Id.* *See* N.D. CENT. CODE § 9-10-07 (1976) (assumption of risk language omitted from this comparative negligence law). Hence, the supreme court ruled that the assumption of risk instruction was unnecessary. *First Trust Co.*, 429 at 9.
2) Whether the trial court erred in excluding evidence regarding firearm sales procedures and prior unlawful sales by Scheels Hardware. *Id.* at 11. The trial court excluded the evidence determining that such evidence lacked probative value. *Id.* The supreme court affirmed this ruling holding that the trial court did not abuse its discretion. *Id.*
3) Whether the trial court abused its discretion in denying the plaintiffs' motion to amend the complaint to assert punitive damages against Scheels Hardware. *Id.* at 11. Rule 15(a) of the North Dakota Rules of Civil Procedure provides that amendments should be allowed when justice so requires. N.D.R. CIV. P. 15(a) *reprinted* in NORTH DAKOTA RULES OF COURT 37 (1988). The supreme court stated that a trial court's decision on such a matter is not to be overruled unless an abuse of discretion is found. *First Trust Co.*, 429 N.W.2d at 9. The court found that the trial court did not abuse its discretion when it allowed the plaintiff to amend the complaint. *Id.*
4) Whether the trial court erred when it admitted testimony indicating that Steven Holen shot at a hockey puck with a twenty-two caliber rifle in the basement of his home on the day of the accident. *Id.* at 11. The supreme court noted that Rule 404(b) of the North Dakota Rules of Evidence does not allow admission of evidence of prior acts to prove a person's character. *Id.* at 12. *See* N.D.R. EVID. 404(b) *reprinted* in NORTH DAKOTA RULES OF COURT 425 (1988). However, the trial judge found probative value in the evidence regarding Steven's knowledge of loading and using twenty-two caliber weapons; hence, the court found that the evidence was admissible. *First Trust Co.*, 429 N.W.2d at 12.
5) Whether the trial court erred by excluding certain testimony by an expert witness regarding injury prevention and injury epidemiology. *Id.* at 12. The trial court did not allow the expert witness to give an opinion on whether Scheels Hardware could have foreseen that the sale of the gun to William Boyer could result in an injury. *Id.* The plaintiffs argued that Rule 704 of the North Dakota Rules of Evidence allows expert testimony even though it embraces an ultimate issue to be decided by the trier of fact. *Id.* *See* N.D.R. EVID. 704 *reprinted* in NORTH DAKOTA RULES OF COURT 464 (1988). The trial court excluded the testimony as being outside the scope of the witness' expertise and because it tended to invade the province of the jury. *First Trust Co.*, 429 N.W.2d at 12. The supreme court held that the trial court did not abuse its discretion when it excluded testimony regarding injury prevention and injury epidemiology. *Id.*
6) Whether the trial court abused its discretion by sustaining an objection to testimony from a Scheels Hardware employee regarding the foreseeability of an accidental shoot-

The first portion of this comment will discuss the development of the negligent entrustment doctrine in North Dakota and its extension in *First Trust Company*. The second portion will focus on recoveries in North Dakota under a loss of consortium claim for death or injury of a close family member, specifically the right of a parent to recover for the loss of a child's society and companionship as set forth in *First Trust Company*.

NEGLIGENT ENTRUSTMENT

The doctrine of negligent entrustment is best described in section 390 of the Restatement (Second) of Torts which subjects suppliers to liability for physical harm caused by a chattel when they know or have reason to know that the chattel may be used in

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ing when a handgun is in the possession of a person under 17 years of age. *Id.* at 12. The trial judge sustained the objection to the employee's testimony because of inadequate foundation by plaintiff's counsel. *Id.* The supreme court ruled that the trial court did not commit reversible error. *Id.*

7) Whether the trial court abused its discretion by allowing a supervisor of hunter education classes to give statistical testimony regarding the foreseeability of a shooting accident. *Id.* at 12-13. The supreme court ruled that the witness was not a qualified expert to testify on accident probabilities, but that the witness was allowed to offer the statistical testimony on foreseeability; thus, the trial court did not err in allowing the statistical testimony. *Id.* at 13.

8) Whether the trial court erred by allowing a jury [???]uction patterned after the plaintiffs' instruction request regarding the foreseeability as an element of proximate cause to be given to the jury. *Id.* The supreme court stated that because of the close similarity between the jury instruction and the plaintiffs' requested instruction, the plaintiffs invited an alleged error and therefore waived the right to raise an objection on appeal. *Id.* The supreme court found that the trial court did not err in allowing the jury instruction regarding foreseeability. *Id.*

9) Whether the trial court erred by not allowing the plaintiffs' requested jury instruction that firearms were dangerous instrumentalities. *Id.* The supreme court ruled that the plaintiffs failed to persuade the court that the trial court erred in denying the jury instruction concerning firearms. *Id.*

10) Whether the trial court erred in refusing the plaintiffs' jury instruction on loss of enjoyment of life as a separate element of damages. *Id.* The supreme court indicated that the trial court's instructions adequately apprised the jury on the law on damages. *Id.* The trial court's instructions told the jury it could consider the following items in arriving at a verdict for damages: 1) compensation for the reasonable value of medical expenses; 2) compensation for the reasonable value of loss of productive time; 3) reasonable compensation for pain, discomfort, and mental anguish; and 4) reasonable compensation for complete or partial permanent disability in health, mind, or person. *Id.* The supreme court ruled that the trial court did not err by refusing to give the jury the plaintiffs' requested instruction on enjoyment of life as a separate element of damages. *Id.* The supreme court reasoned that the plaintiffs could have used loss of enjoyment of life as an element in their argument supporting damages for pain, discomfort, and mental anguish. *Id.*

11) Whether the trial court erred in refusing to grant a judgment notwithstanding the verdict. *Id.* at 14. The test used when considering a motion for judgment notwithstanding the verdict is whether the evidence leads to only one conclusion for which reasonable minds would not differ. *Id.* The supreme court ruled that there was room for difference of opinion on whether the negligence of Scheels Hardware and Kathryn Boyer was a proximate cause of the injuries; therefore, the supreme court found that the motion was correctly denied. *Id.*

an unreasonable manner.[14] Most often the doctrine of negligent entrustment was applied where the chattel was latently defective or inherently dangerous and where the entrustee was a child or was incompetent.[15] This application grew out of common law which subjected a person to liability for entrusting a "potentially dangerous instrumentality" to a child.[16]

In addition, the doctrine of negligent entrustment had roots in the "family purpose doctrine."[17] Under the family purpose doctrine, a person who purchased an automobile for use by his or her family was liable for physical injuries caused by a family member's negligent operation of the automobile.[18] As the family purpose doctrine evolved, the law of agency attached to create a master-servant relationship between the furnishing automobile owner and the family member driving the vehicle.[19] The master-servant relationship was used to create liability in the vehicle owner by

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14. Woods, *Negligent Entrustment: Evaluation of a Frequently Overlooked Source of Additional Liability*, 20 ARK. L. REV. 101, 101 (1966); RESTATEMENT (SECOND) OF TORTS § 390 (1965). Section 390 of the Restatement (Second) of Torts provides:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Id.

15. *See* Fredericks v. General Motors Corp., 48 Mich. App. 580, __, 211 N.W.2d 44, 45-46 (1973)(the theory of negligent entrustment hinges on whether the entrustee may become a negligent user, not on the nature of the chattel). *See also* Woods, *Negligent Entrustment Revisited: Developments 1966-76*, 30 ARK. L. REV. 288, 291 (1976)(although *Fredericks* acknowledged the negligent entrustment doctrine was used mostly in automobile cases, the Michigan Court of Appeals applied the doctrine to a defective power tool injury case).

16. Moning v. Alfono, 400 Mich. 425, __, 254 N.W.2d 759, 767 (1977)(entrusting a chattel to a child who is likely to create a risk to third person is, in itself, an unreasonable risk).

17. *See generally* Annotation, *Comment Note-Modern Status of Family Purpose Doctrine with Respect to Motor Vehicles*, 8 A.L.R. 3D 1191 (1966)(discussing attempts to impute driver's negligence to automobile owner using the family purpose doctrine). The family purpose doctrine was a response to increased litigation resulting from the countless accidents spawned by the mass production of automobiles. *Id.* at 1195. The North Dakota Supreme Court called the family purpose doctrine the "family car doctrine." Posey v. Krogh, 65 N.D. 490, __, 259 N.W. 757, 759 (1934)(owner of family car was potentially responsible for accidents caused by family members authorized to use the car). The family purpose doctrine, however, may have been applied by the courts before the advent of the automobile. Annotation, *supra*, at 1196.

18. *Posey*, 65 N.D. at __, 259 N.W. at 759. An automobile owner's liability was based on his or her control over the vehicle at the time of the accident. *Id.* at __, 259 N.W. at 758. *See also* Annotation, *supra* note 17, at 1199 (ownership of the vehicle by the defendant was one element to be established by a plaintiff pursuing a claim under the family purpose doctrine).

19. Annotation, *supra* note 17, at 1196 (the master-servant relationship imputed negligence to the automobile owner and theoretically burdened the person most capable of paying off a claim).

imputing the servant-driver's negligence to the master-owner.[20]

Eventually the family purpose doctrine was expanded to become a doctrine of negligent entrustment applicable beyond the automobile.[21] For instance, in *Moning v. Alfono*[22] the Michigan Supreme Court expanded the family purpose doctrine by allowing the jury to decide whether a manufacturer and distributor were liable to a bystander injured by a slingshot marketed directly to children.[23] In its discussion of the negligent entrustment doctrine, the court observed that the doctrine was not peculiar to automobiles.[24] Instead, the court explained that the negligent entrustment doctrine involved the application of general principles to be considered when determining whether the entrustor's conduct was reasonable in light of apparent risk.[25] The court further stated that when a child uses a chattel, a reasonable person entrusting the chattel would consider the child's immaturity, inexperience, and carelessness associated with the chattel's use.[26] Hence, the court concluded that it was reasonable for a person who entrusted a chattel to another to consider the risks involved in that entrustment.[27]

Another example of the expansion of the negligent entrustment doctrine by the Michigan courts can be found in *Fredericks v. General Motors Corp.*[28] which involved an injury caused by a defective power tool.[29] In *Fredericks* an employee lost part of his

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20. *Id.* Under the family purpose doctrine, the plaintiff was required to prove four elements: 1) that the defendant owned, controlled, or maintained the car; 2) that the user was a member of the family entitled to use the vehicle; 3) that the use at the time of the accident was for a family purpose; and 4) that the owner gave the driver general permission to use the vehicle. *Id.*

21. *See generally* Woods, *supra* note 15, at 288 (courts use negligent entrustment in a variety of fact situations to pin liability on manufacturers and sellers of chattels that cause injury).

22. 400 Mich. 425, 254 N.W.2d 759 (1977).

23. Moning v. Alfono, 400 Mich. 425, __, 254 N.W.2d 759, 763 (1977). The Michigan Supreme Court held that a reasonable person who entrusts a chattel to a child will consider the child's immaturity, inexperience, and carelessness. *Id.* at __, 254 N.W.2d at 769 (citing RESTATEMENT (SECOND) OF TORTS § 290 comment k (1965)(adult should recognize that a child's inexperience will cause child to act carelessly)).

24. *Moning*, 400 Mich. at __, 254 N.W.2d at 768.

25. *Id.* Case law applying the negligent entrustment doctrine generally involved automobiles, but the doctrine was not restricted in its application by the nature of the chattel. *Id.* at __, 254 N.W.2d at 768 n.24.

26. *Id.* at __, 254 N.W.2d at 769.

27. *Id.* at __, 254 N.W.2d at 769. The court stated that an adult should realize that a child's immaturity causes the child to act carelessly or recklessly regardless of the child's requisite skill. *Id.* at __, 254 N.W.2d at 769.

28. 48 Mich. App. 580, 211 N.W.2d 44 (1973).

29. Fredericks v. General Motors Corp., 48 Mich. App. 580, __, 211 N.W.2d 44, 45 (1973). The court applied the negligent entrustment theory from the Restatement (Second) of Torts, specifically citing comment (b) of section 390. *Id.* at __, 211 N.W.2d at 45. *See* RESTATEMENT (SECOND) OF TORTS § 390 comment b (1965). Comment (b) of section 390 of the Restatement (Second) of Torts provides in part:

left hand as the result of his operation of an unguarded power press.[30] The Michigan Court of Appeals employed the negligent entrustment theory and held the defendant supplier liable for the employee's injuries because the defendant supplier knew of the unsafe operation of the machine.[31] The court noted that the doctrine of negligent entrustment generally applied to inherently dangerous or latently defective chattels supplied to a child or incompetent person.[32] However, relying on the Restatement (Second) of Torts, the court concluded that the negligent entrustment doctrine was not restricted to such a narrow application.[33] The negligent entrustment doctrine is discussed in section 309 of the Restatement (Second) of Torts which provides that the chattel causing harm need not be defective.[34] Hence, the court reasoned that although the power press was not defective, the doctrine of negligent entrustment was applicable because the supplier knew the machine would not be properly operated.[35]

As the scope of the negligent entrustment doctrine broadened, it became a source of recovery from gun sellers for physical harm caused by firearms.[36] However, some courts reject a theory

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> [O]ne who supplies a chattel for the use of another who knows its exact character and condition is not entitled to assume that the other will use it safely if the supplier knows or has reason to know that such other is likely to use it dangerously, as where the other belongs to a class which is notoriously incompetent to use the chattel safely, or lacks the training and experience necessary for such use, or the supplier knows that the other has on occasions so acted that the supplier should realize that the chattel is likely to be dangerously used, or that the other, though otherwise capable of using the chattel safely, has a propensity of fixed purpose to misuse it. This is true even though the chattel is in perfect condition, or though defective, is capable of safe use for the purposes for which it is supplied by an ordinary person who knows of its defective condition.

Id.

30. *Fredericks*, 48 Mich. App. at __, 211 N.W.2d at 45. The defendant owned the die set used on the power press which lacked adequate safety devices and injured the plaintiff. *Id.* at __, 211 N.W.2d at 45.

31. *Id.* at __, 211 N.W.2d at 45. The Michigan Court of Appeals noted that the employee was an intervening foreseeable cause of the injuries, but that the employee's intervention did not extinguish the defendant's liability for supplying a chattel which the defendant knew was unsafe for the intended purposes. *Id.* at __, 211 N.W.2d at 45-46.

32. *Id.* at __, 211 N.W.2d at 45.

33. *Id.* at __, 211 N.W.2d at 46. *See* RESTATEMENT (SECOND) OF TORTS § 390 comment b (1965). For the text of comment (b) of section 390 of the Restatement (Second) of Torts, see *supra* note 28.

34. *Frederick*, 48 Mich. App. at __, 211 N.W.2d at 46. *See* RESTATEMENT (SECOND) OF TORTS § 390 comment b (1965). For the text of comment (b) of section 390 of the Restatement (Second) of Torts, see *supra* note 28.

35. *Frederick*, 48 Mich. App. at __, 211 N.W.2d at 46. The court found that it was irrelevant in a question of a supplier's liability whether the chattel transaction occurred as a gift, sale, loan, bailment, or in some other manner. *Id.* at __, 211 N.W.2d at 46.

36. *See* Semeniuk v. Chentis, 1 Ill. App. 2d 508, __, 117 N.E.2d 883, 885 (1954)(gun retailer held liable when parents purchased air rifle for use by their son who was less than seven years old); Sickles v. Montgomery Ward & Co., 6 Misc. 2d 1000, __, 167 N.Y.S.2d 977, 979 (Sup. Ct. 1957)(gun seller held liable for sale of air gun to parents who gave gun to nine-

which would find a firearm supplier liable for negligent entrustment.[37] Some courts which have refused to apply the negligent entrustment theory to firearm sales reasoned that if a state statute was not violated, there was no illegal sale; therefore, the gun retailer should not be held liable.[38]

The case of *Bernethy v. Walter Failor's, Inc.* [39] is an example of the analysis used by courts to encompass the supply of firearms within the negligent entrustment doctrine.[40] In *Bernethy* the Washington Supreme Court found a gun retailer liable for negligently entrusting a rifle to an intoxicated husband who later shot and killed his wife.[41] The court stated that there was a general duty not to furnish dangerous instrumentalities, like guns, to a person incapacitated by alcohol.[42] The court reasoned that intoxicated persons were "incompetent persons" as defined for negligent entrustment purposes under section 390 of the Restatement (Second) of Torts.[43] Therefore, the court concluded that the gun retailer would be liable under the doctrine of negligent

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year-old son); McMillen v. Steele, 275 Pa. 584, __, 119 A. 721, 721 (1923)(gun store owner liable even though minor purchaser of shotgun negligently shot a youngster); Bernethy v. Walt Failor's Inc., 97 Wash. 2d 929, __, 653 P.2d 280, 283 (1982)(gun dealer held liable for selling gun to intoxicated husband who shot his wife).

37. *See* Stephan v. Marlin Firearms Co., 353 F.2d 819, 824 (2d Cir. 1965)(gun retailer not liable when 15-year-old boy accidentally discharged gun injuring a third person on a hunting trip); Everett v. Carter, 490 So.2d 193, 195 (Fla. Dist. Ct. App. 1986)(gun retailer not liable because it was not foreseeable that retailer's sale of gun would result in a criminal act); Corey v. Kaufman & Chernick, Inc., 70 R.I. 27, __, 36 A.2d 103, 105 (1944)(gun retailer not liable when father purchased gun for 15-year-old son and gun was used by 12-year-old boy who injured the plaintiff); Hulsebosch v. Ramsey, 435 S.W.2d 161, 164 (Tex. Civ. App. 1968)(gun seller not liable when 16-year-old boy injured a third party with a gun purchased as a gift for his father); Masone v. Unishops of Modell's, Inc., 73 A.D.2d 611, __, 422 N.Y.S.2d 450, 451 (1979)(gun retailer not liable when mother purchased rifle for 12-year-old son who shot another child).

38. *Masone*, 73 A.D.2d at __, 422 N.Y.S.2d at 451-52 (gun retailer was not liable because statute was not violated when minor child, who caused injury with an air rifle, was present when his mother purchased the air rifle); *Corey*, 70 R.I. at __, 36 A.2d at 105 (statute allowed sale of gun to 16-year-old boy; hence, gun retailer was not liable for injuries inflicted by the boy's use of the gun).

39. 97 Wash. 2d 929, 653 P.2d 280 (1982).

40. Bernethy v. Walt Failor's, Inc., 97 Wash. 2d 929, __, 653 P.2d 280, 283 (1982).

41. *Id.* at __, 653 P.2d at 284. The Washington state law did not specifically prohibit firearm sales to intoxicated persons, but state statutes prohibited such sales to incompetent persons which the Washington Supreme Court reasoned included intoxicated persons, with both types of sales falling under the umbrella of the negligent entrustment doctrine. *Id.* at __, 653 P.2d at 283-84. The court adopted section 390 of the Restatement (Second) of Torts as a basis for its holding that a gun retailer is liable for selling a firearm to an intoxicated person who shoots another person. *Id.* at __, 653 P.2d at 283. *See* RESTATEMENT (SECOND) OF TORTS § 390 (1965)(supplier of chattel who knows or has reason to know the chattel may pose an unreasonable risk of physical harm is liable for injuries caused by the chattel). For the text of section 390 of the Restatement (Second) of Torts, see *supra* note 14.

42. *Bernethy*, 97 Wash. 2d at __, 653 P.2d at 283. The court rejected the argument that the doctrine of negligent entrustment should not be applicable where the harm was the result of criminal instead of civil conduct. *Id.* at __, 653 P.2d at 283.

43. *Id.* at __, 653 P.2d at 283. *See* RESTATEMENT (SECOND) OF TORTS § 390 (1965). For the text of section 390 of the Restatement (Second) of Torts, see *supra* note 14.

entrustment if it was shown that the retailer entrusted a gun to a person the retailer knew or had reason to know was intoxicated.[44]

Some jurisdictions do not apply the doctrine of negligent entrustment to sellers.[45] In jurisdictions which do not recognize the doctrine of negligent entrustment, many common-law immunities which insulate tortfeasors from liability for their conduct have been stripped away, thereby exposing sellers and other entrustors to liability.[46] For example, automobile guest statutes which prevented vehicle guests from collecting damages for automobile accident injuries are no longer thwarting such recovery.[47]

Various factors may limit the application of the negligent entrustment doctrine to the sale of firearms.[48] For instance, because the doctrine of negligent entrustment applies traditional principles of negligence, a plaintiff must prove that the entrustment proximately caused the injuries suffered in order to recover.[49] Another limiting factor is that several jurisdictions deny recovery in cases of seller-entrustor.[50] The jurisdictions denying recovery against a seller-entrustor reason that the seller-purchaser relationship is more distant and lacks the legal connection found in other relationships.[51] Under a distant relationship, the seller is thought to have no control over the user.[52] The lack of control over the negligent person's conduct is the basis for the conclusion that the seller should not be held legally responsible.[53]

The development of the negligent entrustment doctrine in North Dakota followed the pattern of development found in other

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44. *Bernethy*, 97 Wash. 2d at __, 653 P.2d at 283.

45. Note, *Torts: Does the Negligent Entrustment Doctrine Apply to Sellers?*, 39 U. FLA. L. REV. 925, 927 (1988).

46. Turley, *Manufacturers' & Suppliers Liability to Handgun Victims*, 10 N. KY. L. REV. 41, 43 (1982). Some recoveries for physical harm by firearms are defeated by intervening or superseding third-party conduct; however, strict liability provides recovery in cases where the intervening force is foreseeable to the defendant. *Id.* at 48.

47. Turley, *supra* note 46, at 44 (in addition to the gradual disappearance of guest statutes, more jurisdictions are allowing municipalities to be sued for torts).

48. *See* Note, *supra* note 45, at 926 (plaintiff must prove that the defendant knew or had reason to know that entrustee's actions would create unreasonable risk of harm to others).

49. *Id.* at 926.

50. *Id.* at 927. Traditionally the doctrine of negligent entrustment was applied to parent-child, employer-employee, and principal-agent relationships because they were legal relationships. *Id.* For some courts, to find a person vicariously liable for another person's actions, a legal connection is essential. *See id.*

51. *Id.* Public policy has dictated that negligence for wrongful conduct be imputed only to persons who have control over another person's conduct. *Id.*

52. *See id.* (when the chattel seller has no control over the user of a chattel, the seller is not liable under the negligence theory).

53. *Id.* Those jurisdictions which do not hold the seller liable do not recognize the negligent entrustment doctrine if there is a relationship warranting the maxim "qui facit per alium facit per se — he who acts through another acts by or through himself." *Id.*

jurisdictions which utilized the doctrine primarily in cases of automobile accidents.[54] The recognition of a cause of action for negligent entrustment in North Dakota dates back to the 1930s in the case of *Posey v. Krogh*.[55] In *Posey* the North Dakota Supreme Court recognized the doctrine of negligent entrustment as a valid claim in North Dakota; however, it limited recovery under the doctrine by requiring that the State's guest statute be applied to the doctrine.[56] The court noted that the guest statute relieved the automobile owner of liability to a guest injured in an accident unless the guest could show the owner was grossly negligent.[57] Despite this limitation, the theory of negligent entrustment was used successfully in a number of automobile accident cases in North Dakota.[58]

In North Dakota the negligent entrustment doctrine was not applied to chattels other than automobiles until 1986.[59] The North Dakota Supreme Court extended the doctrine of negligent entrustment to chattels other than automobiles in *Barsness v. General Diesel & Equipment Co.*[60] In *Barsness* a crane supplier was found liable for physical injuries caused by the negligent operation of a crane leased by the supplier to a church.[61] The court adopted

54. *See* Barsness v. General Diesel & Equip. Co., 383 N.W.2d 840, 842 (N.D. 1986) (North Dakota Supreme Court has traditionally applied the negligent entrustment doctrine to automobile accident cases).

55. 65 N.D. 490, __, 259 N.W. 757, 758-59 (1934). In *Posey* the North Dakota Supreme Court refused to hold an automobile owner liable for injuries although the owner's brother negligently drove the owner's car on a pleasure trip and caused physical injuries to another person. *Id.* at __, 259 N.W. at 761. The court denied recovery because the injured passenger failed to establish that the owner permitted her brother to use the car for a pleasure trip or that she was grossly negligent in entrusting the car to her brother's use. *Id.* at __, 259 N.W. at 760.

56. *Posey*, 65 N.D. at __, 259 N.W. at 762. *See* N.D. CENT. CODE § 39-15-03 (repealed in 1979). The North Dakota guest statute limited recovery for gross negligence which the statute defined as "such a degree of recklessness as approaches wanton and willful misconduct." *Id.*

57. *Posey*, 55 N.D. at __, 259 N.W. at 760-61 (under the North Dakota guest statute the burden was on the injured guest to prove an automobile owner's gross negligence was the proximate cause of the accident).

58. *See* Rau v. Kirschenman, 208 N.W.2d 1, 5 (N.D. 1973)(father was not liable for entrusting his vehicle to a son who negligently drove the vehicle and caused injuries to a third person); Posey v. Krogh 65 N.D. 490, __, 259 N.W. 757, 761 (1935)(injured passenger failed to meet the burden of proving gross negligence on the part of the vehicle owner; hence, the owner was found not liable for the injuries). *But see* Rodgers v. Freborg, 240 N.W.2d 63, 65 (N.D. 1976)(state guest statute thwarted recovery for passenger injured when father entrusted automobile to son).

59. Barsness v. General Diesel & Equip. Co., 383 N.W.2d 840, 842 (N.D. 1986) (negligent entrustment doctrine applied to hold crane supplier liable for injuries caused by negligent crane operator).

60. 383 N.W.2d 840, 844 (1986). In *Barsness*, the court held that, under the negligent entrustment doctrine, it was foreseeable that an inexperienced crane operator could cause injuries; hence, the crane supplier was liable if the supplier was aware of the operator's inexperience. Barsness v. General Diesel & Equip. Co., 383 N.W.2d 840, 844 (N.D. 1986).

61. *Id.* at 844. The court held that because reasonable minds could differ on the issue

the reasoning of section 390 of the Restatement (Second) of Torts and found the crane supplier responsible for entrusting its equipment to persons whom the supplier had reason to know may misuse it.[62]

The North Dakota Supreme Court considered expanding the negligent entrustment doctrine further when it was asked to decide whether the doctrine should apply to a gun retailer in *First Trust Co. v. Scheels Hardware & Sports Shop, Inc.*[63] The supreme court based its opinion in *First Trust Company* on its decision in *Barsness* which recognized that the negligent entrustment doctrine could be utilized for chattels other than automobiles.[64] In its reasoning in *First Trust Company*, the supreme court embraced section 390 of the Restatement (Second) of Torts, stating that the negligent entrustment doctrine applied when a chattel supplier had reason to know the chattel's use may involve unreasonable risk of harm.[65] The court concluded that any chattel transaction is governed by the negligent entrustment doctrine when foreseeable, unreasonable risk of harm may result.[66]

The North Dakota Supreme Court ruled that there was sufficient evidence in *First Trust Company* to put the question of negligent entrustment by the gun retailer to the jury.[67] The court reasoned that a jury instruction on negligent entrustment was required because it may have a direct effect on the jury's determination of causation.[68] A determination of causation may be affected by the doctrine of negligent entrustment because under the doctrine a foreseeable misuse of a chattel cannot be a super-

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of foreseeability, the jury should consider whether the crane supplier had reason to foresee misuse of its leased crane. *Id.* at 844.

62. *Id.* at 842. The court recognized that without the issue of foreseeability of the crane's misuse, the trial judge could have decided the issue as a matter of law. *Id. See* RESTATEMENT (SECOND) OF TORTS § 390 (1965)(a supplier of a chattel who foresees misuse of a chattel is liable for injuries caused by such misuse). For the text of section 390 of the Restatement (Second) of Torts see *supra* note 14.

63. 429 N.W.2d 5, 8 (N.D. 1988).

64. First Trust Co. v. Scheels Hardware & Sports Shop, 429 N.W.2d 5, 8 (N.D. 1988). *See Barsness*, 383 N.W.2d at 842 (negligent entrustment doctrine was not limited to automobile cases but expanded to cover suppliers of cranes as well as other chattels).

65. *First Trust Co.*, 429 N.W.2d at 8. *See* RESTATEMENT (SECOND) OF TORTS § 390 (1965). For the text of section 390 of the Restatement (Second) of Torts, see *supra* note 14.

66. *First Trust Co.*, 429 N.W.2d at 8.

67. *Id.* While the supreme court did not elaborate on what specific evidence it deemed significant under the negligent entrustment doctrine, the facts of the case imply that Scheels Hardware could have foreseen the misuse of the handgun. *Id.* at 8-9. *See* RESTATEMENT (SECOND) OF TORTS § 390 (1965)(those who supply chattels to children have reason to know that the children, because of youthfulness and inexperience, are likely to use the chattel in a way which may harm a third person). For the text of section 390 of the Restatement (Second) of Torts, see *supra* note 14.

68. *First Trust Co.*, 429 N.W.2d at 9.

seding intervening cause to extinguish the supplier's liability.[69] The supreme court further recognized that the general principles of intervening forces are applicable to negligent entrustment situations.[70] Consequently, the court reasoned that Scheels Hardware would be liable for Steven Holen's injury if it were found that Scheels Hardware knew or should have known that its sale of the gun to William Boyer could endanger William or others.[71]

The ruling in *First Trust Company* reinforces the North Dakota Supreme Court's previous position that the doctrine of negligent entrustment is applicable to chattels other than automobiles.[72] Furthermore, the decision in *First Trust Company* suggests that North Dakota may apply the negligent entrustment doctrine to any case involving injuries where the supplier could foresee that a chattel is likely to cause unreasonable harm to others.[73] In addition, the *First Trust Company* case specifically

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69. *Id.* at 8. The North Dakota Supreme Court turned to the reasoning of Prosser and Keeton to explain why a child's misuse of a firearm cannot dismiss the firearm supplier's liability because the supplier should have foreseen the risk. *Id.* at 8-9. *See* W.L. PROSSER & W.P. KEETON ON TORTS, 303-304 (5th ed. 1984)(entrusting a gun to a child is risky and potential injuries involve intervening causes which cannot extinguish a gun supplier's liability). *See also* Axelson v. Williamson, 324 N.W.2d 241, 245 (Minn. 1982)(in an automobile accident case, negligent entrustment of an automobile was not superseded by misuse of the automobile; hence, the entrustor is liable for injuries).

70. *First Trust Co.*, 429 N.W.2d at 9. With little explanation, the supreme court quoted from sections 442(A) and 449 of the Restatement (Second) of Torts which pertain to intervening forces and criminal acts and their relationship to a supplier's conduct. *Id. See* RESTATEMENT (SECOND) OF TORTS § 442(A)(1965)(when a person's negligent act creates foreseeable harm, such an intervening cause does not eliminate the person's liability); § 449 (1965)(a third person's actions which makes another person negligent does not eliminate the first person's liability).

71. *First Trust Co.*, 429 N.W.2d at 9. Justice Levine dissented stating that the majority based its opinion not only on the failure to give the requested instruction on negligent entrustment, but also on the failure to instruct that foreseeable misuse of a chattel by the person to whom it has been negligently entrusted cannot be a superseding intervening cause which extinguishes the suppliers' liability. *Id.* at 15 (Levine, J., dissenting). Justice Levine contended that since the plaintiffs did not request the instruction on superseding cause, the majority implicitly applied the obvious error analysis. *Id.* In raising obvious error, the party who fails to object at the trial level has the burden on appeal to show that the error affected the outcome of the case. *Id.* at 16. Justice Levine did not believe that the failure to instruct on superseding cause is so fundamental that, it creates a miscarriage of justice. *Id.* Because Justice Levine believed that the jury verdict would not have changed even if the superseding cause instruction had been given, the error was not fundamental. *Id.* Thus, Justice Levine affirmed the trial court. *Id.*

Justice VandeWalle reluctantly concurred. *Id.* at 14 (VandeWalle, J., concurring). Justice VandeWalle agreed with the majority that the case should be remanded for a new trial and that the instruction on negligent instruction be given. *Id.* at 14. Justice VandeWalle's concurrence was reluctant because he, as did Justice Levine, had serious doubts that the jury would have decided the case differently if any other instruction had been given. *Id.* at 14; *see id.* at 16 (Levine, J., dissenting)(Justice Levine did not believe the jury verdict would have changed with the superseding cause instructions).

72. *Id.* at 8. *See* Barsness v. General Diesel & Equip. Co., 383 N.W.2d 840, 842 (N.D. 1986)(doctrine of negligent entrustment is not limited to automobile cases, but may apply to other chattels such as cranes).

73. *First Trust Co.*, 429 N.W.2d at 8. The North Dakota Supreme Court ruled that there is no reason why the doctrine of negligent entrustment should not apply to chattels

implies that gun retailers must become more aggressive in determining who will use their products after sale to prevent firearm injuries.

LOSS OF CONSORTIUM

Loss of consortium has been a cause of action for hundreds of years.[74] Under the common law, loss of consortium began as a cause of action for a husband who lost the services of his wife due to another's wrongful acts.[75] The loss of services action was premised on the theory that a wife was her husband's servant and the husband, as master, had a proprietary right to his wife's services; therefore, any intentional interference with the wife's services created a cause of action for the husband.[76] Over time, the master-servant relationship between husband and wife was coined "consortium" and comprised many legal rights including services, society,[77] and sexual intercourse.[78] Loss of services was the dominant element in a husband's cause of action for loss of consortium;[79] however, some courts compensated for loss of affection, creating a legal fiction which treated a claim for loss of companionship as analogous to a claim for loss of services.[80] Because of the difficulty in measuring loss of affection, some courts adopted a pecuniary loss standard which compensated only for the loss of a wife's services, and thereby disallowed recovery for sentimental

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other than automobiles when the chattels are entrusted to an incompetent or inexperienced person. *Id.*

74. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 124, at 874 (4th ed. 1971). An action arising out of loss of consortium developed as an offshoot of redressing interference of the master-servant relationship. *Id.* at 873. *See also* Comment, *Loss of Consortium: Paradise Lost, Paradise Regained*, 15 CUMB. L. REV. 179, 180 (1984)(loss of consortium traced from common law to modern theories of recovery).

75. *Comment, supra* note 74, at 183. The loss of a wife's consortium was described as a loss of "company." *See, e.g.*, Guy v. Livesey, 79 Eng. Rep. 428, 428 (1618)(husband allowed to recover damages for lost company of his injured wife).

76. W. PROSSER, *supra* note 74, at 874. The relation between husband and wife was based on a form of marriage recognized by law. *Id.* Eventually, courts recognized a husband's claim of action against a negligent tortfeasor, in addition to an intentional tortfeasor, who infringed upon the husband's proprietary interest which included the wife's duties of caring for the home, serving her husband, and raising children. *Comment, supra* note 74, at 184.

77. Guevin v. Manchester St. Ry., 78 N.H. 289, __, 99 A. 298, 301 (1916). *See Comment, supra* note 74, at 182-83 (as an aid in defining the term consortium, society embraced a broad range of benefits family members received from each other such as love, care, companionship, comfort, and protection).

78. W. PROSSER, *supra* note 74, at 874. As the loss of consortium claim evolved, interference with any one of the rights of the husband enjoyed in the husband-wife relationship was a cause for legal action. *Id.*

79. *Comment, supra* note 74, at 184.

80. *Id.* (few courts made attempts to segregate claims for loss of service and claims for loss of consortium, compensating for both).

loss.[81] Although jurisdictions were split regarding the proper recovery of damages for a loss of consortium action, most early common-law courts recognized the husband's right to be compensated for loss of his wife's society and affection even though a firm dollar amount could not be attached.[82] Consequently, the term "pecuniary loss" was expanded to include non-economic damages such as lost care, nurturing, companionship, and protection where the deceased person was a spouse, parent, or child.[83]

Eventually, the phrase "loss of consortium" shifted from the strict interpretation which only allowed a husband's cause of action to an interpretation encompassing other relational interests including those enjoyed by the wife.[84] In the late nineteenth century courts began to recognize a wife's loss of spousal consortium claim for intentional torts against her husband.[85] Courts reasoned that it would be unconstitutional under the equal protection clause of the fourteenth amendment of the United States Constitution to allow a husband recovery for loss of consortium but not a wife.[86] A claim by a wife for a negligent act interfering with the right to her husband's consortium was first recognized in 1950.[87] By the early 1970s a majority of jurisdictions allowed women to bring actions for loss of their husband's consortium caused by intentional and negligent actions.[88]

Although recovery for loss of consortium claims has been gradually expanding, as of 1978 only one state allowed children a claim for loss of parental consortium due to a negligent act.[89] Children's claims for loss of parental consortium were first raised in the 1920s under the guise of alienation of affection cases which were

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81. *Id.*

82. *Id.* at 185.

83. Joselson, *Parents' "Pecuniary Injuries" for the Wrongful Death of an Adult Child: Where is the Love?*, 12 VT. L. REV. 57, 58 (1987).

84. *Comment*, *supra* note 74, at 182. The common law has been expanded to protect the relationships enjoyed by immediate family members. *Id.*

85. Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1, 4-5 (1923). The Married Women's Acts allowed women, like men, to freely hold property, including earnings. *Id.*

86. *Comment*, *supra* note 74, at 191. *See* U.S. CONST. amend. XIV.

87. *Comment*, *supra* note 74, at 188. *See* Hitaffer v. Argonne Co., 183 F.2d 811, 813 (D.C. Cir. 1950)(wife recovered under loss of consortium claim against her husband's employer after injured husband received workmen's compensation and was denied recovery against his employer), *cert. denied* 340 U.S. 852, 852 (1950), *overruled on other grounds* 242 F.2d 220, 221 (D.C. Cir. 1957).

88. Note, *Torts — Arizona Parents Allowed to Recover for Loss of Injured Child's Consortium*, 1986 ARIZ. ST. L.J. 127, 130.

89. Comment, *The Parental Claim for Loss of Society and Companionship Resulting from the Negligent Injury of a Child: A Proposal for Arizona*, 1980 ARIZ. ST. L.J. 909, 914. Courts have stated many reasons to justify denying children recovery for loss of parental consortium the most common of which is precedent. *Id.* at 920.

based on the defendant's intentional interference with the family relationship.[90] In the 1940s at least four jurisdictions had allowed a child's claim for loss of filial consortium due to an intentional wrongful act.[91] However, courts resisted granting children a claim for loss of filial consortium fearing it would increase lawsuits, create extortionary litigation, and breed problems in determining the proper recovery.[92] Regardless of this reasoning, commentators predict that courts will recognize that protecting a child's interest in the filial relationship is equally as important as protecting the parent's interest; hence, in the future more jurisdictions will likely allow children recovery for loss of filial consortium.[93]

Unlike claims by children for loss of parental consortium, claims by parents for loss of consortium due to injury or death of a child are being recognized by more courts.[94] As courts allow par-

90. *Comment, supra* note 74, at 197 (in the 1920s courts were beginning to recognize that common law precedent disallowing a child's claim for loss of consortium could not be justified).

91. *Id. See* Daily v. Parker, 152 F.2d 174, 177 (7th Cir. 1945)(court allowed child cause of action against person who enticed child's father away from family); Russick v. Hicks, 85 F. Supp. 281, 284 (W.D. Mich. 1949)(children allowed cause of action against person who induced children's mother to desert them); Johnson v. Luhman, 330 Ill. App. 598, __, 71 N.E.2d 810, 811 (1947)(potential flood of litigation was not sufficient reason to deny children a cause of action against person who alienated father's affection); Miller v. Monsen, 228 Minn. 400, __, 37 N.W.2d 543, 547 (1949)(lack of precedent did not justify denying children right to seek damages against outsider who enticed parent away from them).

92. *Comment, supra* note 74, at 198-99. *See* Taylor v. Keefe, 134 Conn. 156, __, 56 A.2d 768, 770 (1947)(minor child refused recovery for damages due to mother's alienation of affection because, for one reason, it is difficult to determine when childhood ceases); Nelson v. Richwagen, 326 Mass. 485, __, 95 N.E.2d 545, 546 (1950)(minor daughter had no right of action against a third person for enticing father away from family because a minor child is not legally entitled to a parent's care or presence).

93. *Comment, supra* note 74, at 198. *See* Hill v. Sibley Memorial Hosp., 108 F. Supp. 739, 741 (D.C. 1952)(common law should be continually reinterpreted and changed to meet current situations; therefore, a child should be allowed to recover for loss of a parent's love and companionship); Berger v. Weber, 82 Mich. App. 199, __, 267 N.W.2d 124, 125-26 (1978)(common law should not remain static, and because of a parent's crucial role in a child's development, a child will be allowed to recovery loss of parental society).

94. Annotation, *Parent's Right to Recover for Loss of Consortium in Connection with Injury to Child*, 54 A.L.R. 4th 115, 116 (1987); *see* Howard Frank v. Superior Court, 150 Ariz. 228, __, 722 P.2d 955, 959-60 (1986)(parent allowed damages for loss of companionship of injured adult child); Reben v. Ely, 146 Ariz. 309, __, 705 P.2d 1360, 1361, 1365 (Ariz. App. Ct. 1985)(mistaken administration of liquid cocaine to son resulted in award to parents for damages for loss of filial consortium); Yordon v. Savage, 279 So. 2d 844, 846 (Fla. 1973)(cause of action is available to parents who suffered indirect economic losses after pediatrician negligently treated minor child); Hayward v. Yost, 72 Idaho 415, __, 242 P.2d 971, 977 (1952)(parents allowed to maintain action for loss of minor child's society stemming from automobile accident); Dymek v. Nyquist, 128 Ill. App. 3d 859, __, 469 N.E.2d 659, 666 (1984)(father recovered for loss of son's society due to psychiatric treatment which alienated son's affection for father); Craig v. IMT Ins. Co., 407 N.W.2d 584, 586 (Iowa 1987)(parents may recover damages from loss of unborn child's consortium after fetus died following an automobile accident); Currie v. Fiting, 375 Mich. 440, __, 134 N.W.2d 611, 615 (1965)(parents allowed to claim loss of child's society in wrongful death action); Wycko v. Gnodtke, 361 Mich. 331, __, 105 N.W.2d 118, 122 (1960)(parents may recover pecuniary value of adult son's life); Fussner v. Andert, 261 Minn. 347, __, 113 N.W.2d 355, 357 (1961)(court found pecuniary loss test too restrictive and allowed parent to

ents to recover for loss of filial consortium, they move away from the traditional theory that damages are allowed strictly for easy to measure pecuniary losses.[95] One reason for this move to parent-child consortium claims might be that parents derive pleasure from children, choosing to have children because of nontangible benefits like emotional bonding.[96] These nontangible benefits are viewed by most parents to outweigh child rearing costs.[97] Furthermore, courts began to recognize that the economic climate today is much different than in past decades.[98] In today's economic climate, children are allowed to keep their earnings; hence, parents are less likely to claim a loss for a minor child's earnings.[99] With the recognition that parents have children because of nontangible benefits and the current economic realities, some courts have concluded that parents are entitled to recover for loss of a child's comfort and companionship.[100]

In *Sanchez v. Schindler*[101] the Texas Supreme Court rejected the static pecuniary loss rule and allowed a parent to recover for

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recover for loss of advice, comfort, assistance, and protection of child); Norvell v. Cuyahoga County Hosp., 11 Ohio App. 3d 70, __, 463 N.E.2d 111, 114 (1983)(parent may recover loss of child's society, services, companionship, comfort, love, and solace when negligent tortfeasor injures minor child); Sanchez v. Schindler, 651 S.W.2d 249, 251 (Tex. 1983) (recovery for death of child no longer governed by pecuniary loss and parents may be compensated for loss of companionship and society for death of minor child); Van Cleave v. Lynch, 109 Utah 149, __, 166 P.2d 244, 249 (1946)(jury permitted to allow recovery for loss of child's comfort, society, and companionship); Lockhart v. Besel, 71 Wash. 2d 112, __, 426 P.2d 605, 609 (1967)(wrongful death damages under state statute extended recovery to include loss of companionship of children); Shockley v. Prier, 66 Wis. 2d 394, __, 225 N.W.2d 495, 499 (1975)(parents allowed to recover loss of child's aid, comfort, society, and companionship during minority); Gates v. Richardson, 719 P.2d 193, 201 (Wyo. 1986) (husband allowed to recover for the loss of wife's consortium due to negligent death of child which caused wife's emotional injuries thereby depriving husband of marital consortium). Other jurisdictions do not allow claims by parents for loss of consortium due to injury or death of a child. Van Steenburgh v. Sclar, 676 F. Supp. 579, 580 (M.D. Pa. 1987) (Pennsylvania law does not allow parents a loss of filial consortium claim); Tullai v. Homan, 241 Cal. Rptr. 255, 256, 195 Cal. App. 3d 1184, __ (1987)(California does not allow parents to recover for loss of child's consortium).

95. Ferguson, *Damages for the Death of a Minor Child under the Texas Wrongful Death Act*, 4 ST. MARY'S L.J. 157, 164 (1972). Some courts recognize that in today's economic climate a child is not a pecuniary gain but rather a pecuniary loss because of the costs of raising children and the courts ignore pecuniary formulas compensating for loss of the child's love. *Id. See* Sanchez v. Schindler, 651 S.W.2d 249, 251 (Tex. 1983)(real loss for death of a child is not financial benefit that the child would have given the parent but loss of the child's love).

96. Bruce, *Measure of Damages for the Wrongful Death of a Child*, 66 CAN. B. REV. 344, 347 (1987).

97. *Id.*

98. *Id. See* Shockley v. Prioer, 66 Wis. 2d 394, __, 225 N.W.2d 495, 499 (1975) (traditionally parents were entitled to children's earnings as well as children's services).

99. *Id.* at __, 225 N.W.2d at 499.

100. Bruce, *supra* note 96, at 348. *See Shockley*, 66 Wis. 2d at __, 225 N.W.2d at 499 (children are no longer an economic asset but require great expenditure by parents).

101. 651 S.W.2d 249 (Tex. 1983).

loss of a child's companionship due to a negligent act.[102] Before this decision, the Texas Supreme Court had limited damages to the pecuniary value of the child's services and financial contributions pursuant to a state statute which provided recovery for "actual damages."[103] The court found that because the Texas wrongful death statute did not expressly limit damages to pecuniary value, the court had the authority to interpret amages in conformity with changing societal norms.[104] Furthermore, the court noted that damages for loss of consortium were similar to damages for pain and suffering and were not too uncertain to be measured in monetary terms.[105] Other jurisdictions moved away from the traditional pecuniary loss theory by expanding the concept of pecuniary injuries to include not only economic-based losses, but also noneconomic damages like lost care, nurturing, and companionship.[106] Recovery of noneconomic damages for loss of consortium claims comprise a notable trend followed by the majority of jurisdictions, including the United States Supreme Court.[107]

North Dakota case law regarding recovery for loss of consortium claims followed the traditional common-law view that the

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102. Sanchez v. Schindler, 651 S.W.2d 249, 251 (Tex. 1983).

103. *Id. See* TEX. REV. CIV. STAT. ANN. art. 4671 (repealed 1985). Although the Texas statute expressly provided for "actual damages on account of the injuries causing the death" in wrongful death cases, the statute did not explicitly limit damages to pecuniary losses. *Sanchez*, 651 S.W.2d at 251. *See* TEX. REV. CIV. STAT. ANN. art. 4671 (repealed 1985). Therefore, the Texas Supreme Court ruled that parents could recover damages for loss of their injured son's love and companionship. *Sanchez*, 651 S.W.2d at 251.

104. *Sanchez*, 651 S.W.2d at 252. As of the Texas Supreme Court decision in 1983, 35 states allowed parents loss of consortium claims for the death of a child. *Id. See* TEX. REV. CIV. STAT. ANN. art. 4671 (repealed 1985)(Texas wrongful death statute read: "actual damages on account of the injuries causing the death").

105. *Sanchez*, 651 S.W.2d at 253. The court concluded that fear of excessive verdicts is an insufficient justification to deny recovery for loss of consortium in light of adequate judicial safeguards to prevent damages based on prejudice rather than fair compensation. *Id. See also* Walker v. St. Paul Ins. Cos., 343 So. 2d 251, 253 (La. Ct. App. 1977)(no amount of money adequately compensates parents for loss of a child's companionship, but dollars are the only method for compensation).

106. *Joselson, supra* note 83, at 58 (although Vermont has adopted an expansive view of pecuniary injuries, it has not recognized that parents of unmarried, adult child decedents are entitled to relational damages). *See also* S. SPEISER, RECOVERY FOR WRONGFUL DEATH, § 3.49, at 318 (1975)(several jurisdictions which have followed a strict pecuniary loss rule now allow recovery for what they term the "pecuniary value" of the decedent's society and companionship).

107. *Joselson, supra* note 83, at 64. *See also* Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 587 (1982)(under maritime law, a longshoreman's wife recovered the "pecuniary" loss of the decedent's society and companionship following an accident aboard a vessel); D'Ambra v. United States, 481 F.2d 14, 21 (1st Cir. 1973)(in assessing damages for noneconomic losses for child's death, federal courts consider remaining period of child's minority and the cohesiveness of the family unit); Palermo v. Allstate Ins. Co., 415 So. 2d 437, 448 (La. Ct. App. 1982)(evidence that child was notably devoted to parents is significant consideration in calculating damages for emotional loss after child's death); Vandeburg v. Langan, 192 Neb. 779, __, 224 N.W.2d 366, 371 (1974)(in evaluating noneconomic damages for parent who has lost a child, higher amounts should be given for an outstanding child who has excelled scholastically and athletically).

male head-of-household was the only family member allowed to bring such a claim.[108] Furthermore, the North Dakota Supreme Court followed the strict interpretation of pecuniary damages for a loss of consortium claim and compensated only for the value of the lost services.[109] Accordingly, in *Stejskal v. Darrow*[110] the North Dakota Supreme Court ruled that a father had no wrongful death claim for loss of companionship and society of his child because a pecuniary value could not be attached to sentimental and intangible benefits.[111] As a result of this narrow interpretation of "pecuniary," the North Dakota Supreme Court refused a parent damages beyond services the child would have performed for the parent during the age of minority.[112] In addition to refusing compensation for a parent's loss of consortium claim for wrongful death of a child, the North Dakota Supreme Court denied such compensation when a child was merely injured, citing the same reasoning it used in its denial for loss of consortium arising from the wrongful death of a child.[113]

In the 1950s the North Dakota Supreme Court appeared to soften its view of pecuniary damages regarding loss of society

108. Hastings v. James River Aerie No. 2337, 246 N.W.2d 747, 749 (N.D. 1976)(as courts changed common-law views to allow the wife recovery for loss of a husband's consortium, the North Dakota Supreme Court reexamined common law and allowed a wife to recover damages for loss of spousal consortium). *See also* Milde v. Leigh, 28 N.W.2d 530, 534 (N.D. 1947)(husband entitled to recover loss of wife's services and consortium).

109. *See* Scherer v. Schlaberg, 18 N.D. 421, __, 122 N.W. 1000, 1002 (1909)(recoverable damages by father for death of a minor child is the probable value of the child's services during minority, considering cost of rearing).

110. 55 N.D. 606, 215 N.W. 83 (1927).

111. Stajskal v. Darrow, 55 N.D. 606, __, 215 N.W. 83, 85 (1927)(North Dakota Supreme Court followed English common law which denied recovery for sentimental and intangible benefits arising from the relationship of father and child), *overruled*, Hopkins v. McBane, 427 N.W.2d 85, 94 (N.D. 1988). In 1931 the North Dakota Supreme Court reiterated the *Stejskal* decision. *See* Kalsow v. Grob, 61 N.D. 119, __, 237 N.W. 848, 849 (1931)(parent was given no recovery for "loss of society or companionship, comfort, joy, or pleasure" when a child was hit by a car and later died). The denial of nonpecuniary damages by the court evolved from a decision in the late 1800s in which the North Dakota Supreme Court held that compensation for loss of consortium was an "imaginary" damage and served only to punish a negligent person; therefore, it would not be allowed. Haug v. Great Northern Ry. Co., 8 N.D. 23, __, 77 N.W. 97, 102 (1898)(North Dakota's law on damages for loss of a relative were patterned after early common-law statutes which were interpreted to exclusively provide for monetary damages), *overruled*, 427 N.W.2d 85, 94 (N.D. 1988).

112. *Scherer*, 122 N.W. at 1002 (parent compensated only for the probable value of the child's services during minority, considering costs of child rearing during infancy). *See also Haug*, 8 N.D. at __, 77 N.W. at 101 (North Dakota Supreme Court followed strict interpretation of pecuniary damages, reasoning any other damages were imaginary and would punish the negligent person), *overruled*, Hopkins v. McBane, 427 N.W.2d 85, 94 (N.D. 1988).

113. *See Kalsow*, 61 N.D. at __, 237 N.W. at 849 (no recovery for damages in the way of solatium).

claims.[114] The court began to liberally construe "pecuniary loss" to allow damages for the expected work and assistance a decedent would have produced in raising the family; however, this did not include sentimental loss of companionship.[115] In conjunction with the supreme court's increased willingness to award damages outside immediate monetary losses, the court began to allow compensation for pain and suffering even though such awards could not be arithmetically calculated.[116]

In *Umphrey v. Deery*[117] the court reasoned that wrongful death damages should not be so narrowly construed as to allow only immediate loss of money damages and not other damages like those for loss of maintenance because the word "pecuniary," referring to money, does not appear in the wrongful death statute.[118] Despite the court's reasoning in *Umphrey*, it would not allow recovery for injured feelings.[119] For over thirty years the court did not allow parents recovery for the hurt feelings associated with the loss of filial companionship.[120]

In 1988 the North Dakota Supreme Court considered the issue of whether parents should be allowed to recover damages for the loss of filial consortium in *First Trust Co. v. Scheels Hardware & Sports Shop, Inc.*[121] In its reasoning, the supreme court recognized the contrary precedent and the dynamic nature of the common law.[122]

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114. Henke v. Peyerl, 89 N.W.2d 1, 11 (N.D. 1958)(when a child is killed a substantial loss will be presumed and such loss need not be measured in dollars and cents).

115. *See* Quam v. Wengert, 86 N.W.2d 741, 753 (N.D. 1957)(jury may consider the value of the nurture and instruction a deceased father would have given his children had he lived).

116. Lake v. Neubauer, 87 N.W.2d 888, 891 (N.D. 1958)(pain and suffering damages are determined according to the "common knowledge, the good sense, and practical judgment of the jury").

117. 78 N.D. 211, 48 N.W.2d 897 (1951).

118. Umphrey v. Deery, 78 N.D. 211, __, 48 N.W.2d 897, 906 (1951). *See* N.D. CENT. CODE § 32-21-02 (1976). Section 32-21-02 of the North Dakota Century Code provides: "In an action brought under the provisions of this chapter, the jury shall give such damages as it finds proportionate to the injury resulting from the death to the persons entitled to the recovery." *Id.*

119. *Umphrey*, 78 N.D. at __, 48 N.W.2d at 913. The North Dakota Supreme Court refused recovery for "injured feelings" but considered a variety of items in establishing wrongful death damages such as the deceased's health, mental, and physical capacity, habits of industry, and customary earnings. *Id.*

120. *See generally* McKee v. Thompson, 558 F. Supp. 68 (D.N.D. 1983)(history of North Dakota Supreme Court decisions indicated a willingness to repudiate a strict construction of pecuniary loss standard).

121. 429 N.W.2d 5, 8 (N.D. 1988). A similar case was decided the same day as *First Trust Co.* in which the supreme court also ruled that parents may recover for the loss of filial consortium. *See* Hopkins v. McBane, 427 N.W.2d 85, 92 (N.D. 1988)(the loss of a child is a "deep emotional wounding" that should be compensated for when a child is negligently injured or killed). *See also* Jacobs v. Anderson Bldg. Co., 430 N.W.2d 558, 559-60 (N.D. 1988)(parents allowed to recover loss of consortium after daughter was seriously injured).

122. *First Trust Co.*, 429 N.W.2d at 10. Quoting from Chief Justice Vanderbilt's

The supreme court noted that the common-law rule treated children as servants whose wages were crucial to the family unit; hence, recovery for the loss of a child related to the economic loss of the child's earnings.[123] Relying on the Wisconsin case of *Shockley v. Prier*,[124] the court reasoned that today the society and companionship received from children are more important to parents than the benefit of their children's earning capacity.[125] In addition, the court noted that the common-law rule denying parental recovery was being eroded by the changing view of family relationships.[126] The court stated that to continue denying parents recovery for loss of filial consortium would be a serious detriment to society considering the altered attitude toward children; thus, the court held that parents may recover for loss of a child's society and companionship.[127]

After determining that parents may recover for the loss of a child's society and companionship, the North Dakota Supreme Court turned to a discussion of how damages for these losses should be calculated.[128] The court stated that historically only pecuniary damages, excluding loss of society, were recoverable in loss of filial consortium cases.[129] Additionally, the court noted that

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comments in State v. Culver, 23 N.J. 495, __, 129 A.2d 715, 844 (1957), the North Dakota Supreme Court acknowledged that common law should be changed periodically to adapt to the current needs of society. *Id.* (citing State v. Culver, 23 N.J. 495, __, 129 A.2d 715, 844 (1957)).

123. *First Trust Co.*, 429 N.W.2d at 10. The court implied that courts are moving away from the common-law reasoning that a child's earnings are more significant to parents than the child's love and affection. *Id.*

124. 66 Wis. 2d 394, __, 225 N.W.2d 495, 498 (1975).

125. *First Trust Co.*, 429 N.W.2d at 10. Noting a split in the jurisdictions regarding the common-law rule of denying parents loss of filial consortium, the supreme court stated that the common law should be abandoned. *Id.*

126. *Id.* The court recognized that a number of jurisdictions had allowed parents to recover for loss of filial consortium. *Id. See* Reben v. Ely, 146 Ariz. 309, __, 705 P.2d 1360, 1361 (Ariz. App. Ct. 1985)(parents allowed to recover for loss of son's consortium after son died from being given the wrong type of medicine); Dymek v. Nyquist, 129 Ill. App. 3d 859, __, 469 N.E.2d 659, 666 (1984)(father awarded damages for loss of son's consortium resulting from psychiatric treatments); Shockley v. Prier, 66 Wis. 2d, __, 225 N.W.2d 495, 499 (1975)(parents allowed to recover for loss of child's companionship during minority).

127. *First Trust Co.*, 429 N.W.2d at 11. North Dakota's personal injury and wrongful death statute was amended, effective July 8, 1987, to provide compensation "for a plethora of noneconomic damages, none of which are capable of precise arithmetic calculation." *Id. See* N.D. CENT. CODE § 32-03.2-04 (Supp. 1987). Section 32-03.2-04 of the North Dakota Century Code provides in pertinent part:

> Compensation for noneconomic damages, which are damages arising from pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, fear of injury, loss or illness, loss of society and companionship, loss of consortium, injury to reputation, humiliation and other nonpecuniary damage.

Id.

128. *First Trust Co.*, 429 N.W.2d at 10-11.

129. *Id.* at 10. *See* Stejskal v. Darrow, 55 N.D. 606, __, 215 N.W. 83, 85 (1927)(English

previous case law in North Dakota adopted the pecuniary loss standard and refused recovery for parent's loss of filial consortium.[130] Despite decisions against nonpecuniary recovery, the North Dakota Supreme Court indicated that the flexibility of the common law allowed the law to adjust to conform to a changing society.[131] Consequently, the court concluded that it was time to re-examine its position that only pecuniary damages were recoverable.[132] After this re-examination of its position on damages, the court determined that society's changed view of children supported the rationale for allowing noneconomic damages.[133]

The North Dakota Supreme Court noted that more than thirty years ago it had given a less restrictive interpretation to pecuniary loss.[134] The court emphasized its ruling in *Henke v. Peyerl*[135] which, while emphasizing a pecuniary loss standard as opposed to a nonmoney award, allowed a parent to recover damages involving "comfort . . . of a kind, faithful and loving child . . ." resulting from the wrongful death of a child.[136] In addition, the court cited its willingness to award damages for pain and suffering although such damages could not be arithmetically calculated.[137] Hence, consistent with its recent decisions to expand recovery under the umbrella of pecuniary damages, the North Dakota Supreme Court ruled in *First Trust Company* that a parent may recover for the nonpecuniary loss of society and companionship of a child.[138]

The North Dakota Supreme Court's ruling in *First Trust Company*, allowing parents to recover for loss of filial companionship

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common law allowed pecuniary damages as the exclusive recovery and such damages did not include loss of society or companionship).

130. *First Trust Co.*, 429 N.W.2d at 10. *See* Kalsow v. Grob, 61 N.D. 119, __, 237 N.W. 848, 849 (1931)(in a personal injury action, a father cannot recover for loss of the child's society and companionship); Stejskal v. Darrow, 55 N.D. 606, __, 215 N.W. 83, 85 (1927) (father denied recovery against negligent physician following daughter's death because common law did not allow recovery for nonpecuniary damages).

131. *First Trust Co.*, 429 N.W.2d at 10.

132. *Id.*

133. *Id.* The North Dakota Supreme Court recognized a split of authority in recent decisions and stated it would follow those courts allowing parents to recover damages for loss of consortium. *Id.*

134. *Id.* 429 N.W.2d at 11. *See* Umphrey v. Deery, 78 N.D. 211, __, 48 N.W.2d 897, 908 (1951)(in a wrongful death action, the jury was not restricted to immediate monetary damages but could consider loss of benefits capable of being estimated).

135. 89 N.W.2d 1 (N.D. 1958).

136. *First Trust Co.*, 429 N.W.2d at 11 (citing Henke v. Peyerl, 89 N.W.2d 1, 9 (N.D. 1958)(pecuniary loss is not so narrowly restricted as to include only cash-earning value of a deceased minor child; hence, jury may consider "all the contingencies involved")).

137. *First Trust Co.*, 429 N.W.2d at 11. *See* Lake v. Neubauer, 87 N.W.2d 888, 891 (N.D. 1958)(to determine damages for an action for pain and suffering, the jury must employ its common knowledge, good sense, and practical judgment).

138. *First Trust Co.*, 429 N.W.2d at 11.

and society, signified the court's movement toward expanding recoveries for nonpecuniary damages resulting from death or injury of a family member.[139] Accordingly, the court hinted it may be willing to continue its expansion in this area by considering a claim by children for loss of parental consortium.[140] Consequently, the court's movement toward expansion of pecuniary recovery may mean that children and nonmarital cohabitating partners may claim recovery for loss of their parent's or partner's consortium.

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139. *Id.*

140. *Id.* at 11 n.5. There may be no justifiable distinction which would preclude a child's recovery for loss of parental consortium when a parent is allowed recovery for loss of filial consortium. *Id. See* Baxter v. Superior Court, 19 Cal. App. 461, __, 563 P.2d 871, 873-74, 138 Cal. Rptr. 3d 315, 317-18 (S.Ct. 1977)(differences between a parent's claim for loss of filial consortium and child's claim for loss of parental consortium are not so great as to justify allowing one claim and denying the other claim).